IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.04.2007

CORAM

THE HONOURABLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.816 of 1995 &

C.M.P.No.8539 of 1995

M.Subramani . . Appellant/Plaintiff

Versus

1.P.Shanmugam
2.P.Ganesan
3.P.Govindaraj . . Respondents/Respondents

Prayer: This second appeal is filed to set aside the Judgment and decree of the Subordinate Judge, Poonamallee, Chengai M.G.R. District dated 31.08.1994 made in A.S.No.21 of 1993 and confirm the judgment and decree of the Additional District Munsif, Poonamallee, Chengai M.G.R.District, dated 29.01.1993 made in O.S.No.2350 of 1990.

For Appellant :M/s.R.Radha for
Mr.S.Senthilnathan
For Respondents:Mr.V.Chandrakanthan for
Mr.K.Verraraghavan

JUDGMENT

The plaintiff in the trial Court is the appellant in the second appeal. The suit filed by the plaintiff for injunction in respect of a vacant house site to an extent of 1147½ sq.ft admeasuring 13 ½ feet in the North-South and 85 feet in the East-West bounded on the North by the site of the defendants 1 and 2, on the south by the site of the third defendant, on the East by the Channel and on the West by the common pathway and the open space Vasal for the beneficial use and enjoyment of the plaintiff and his wife and the defendants 1 and 2 comprised in Gramanatham Survey No.96 of Thirisoolam Village, Madras.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

2.The case of the plaintiff is that he has purchased the suit property under the sale deed dated 14.10.1982 and he is in possession of the same and before his purchase his brothers were in possession and the defendants 1 and 2 have attempted to encroach upon the northern side of the plaintiff's property and the third defendant has attempted to encroach upon the southern side, which was prevented by the Public.

3.The defendants however denied any right to the plaintiff in respect of the passage as well as open space and the defendants are in possession of the property which belonged to them. That apart, it is the case of the defendants that the document dated 04.10.1982 had been fraudulently created.

4.Considering the fact that the defendants in I.A.No.3093 of 1990 in the above said suit by way of an affidavit admitted the plaintiff's possession and on that basis, finding that both the plaintiff and defendants are in enjoyment of Grama Natham and therefore there cannot be any patta or payment of kist and accepting Ex.A1 and Ex.A2 filed on behalf of the plaintiff decreed the suit in favour of the plaintiff, as against which, the defendants have filed the first appeal and rejecting the document relied upon by the plaintiff under Ex.A1 which is unregistered sale deed but relying upon Ex.B10 and Ex.B11 stated to have been effected much before Ex.A1, the appellate Court has allowed the appeal thereby dismissing the suit. As against which the plaintiff has filed the second appeal.

5.While admitting the second appeal, the following substantial question of law is framed;

> "Whether the recital in Ex.B10 and Ex.B11 are binding on the plaintiff who is not a party to the said documents?"

6.As correctly pointed out by the learned counsel for the appellant, in a suit for injunction, the point to be considered is as to whether the plaintiff who claims to be in possession has proved or not on his own merits and not on the demerits of the defendants. It is with that basic principle the trial Court has considered Ex.A1 sale deed even though the same is not a registered one stating that since the plaintiff's predecessors have been in possession, there was no necessity for registration and given a finding that the plaintiff was in possession. Therefore, the trial Court has held that there was no necessity for declaration of title and also considering the admission made by the defendants in the affidavit which forms part of the suit in an Interlocutory Application admitting the possession of the plaintiff and also clearly given a finding that the Ex.B10 and Ex.B11 are not situated in the suit property marked as ABCD and

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

therefore granted the decree of injunction. On the other hand, the appellate Court even though has made a reference about Ex.A1 and also stating the various contents of Ex.A1 has not chosen to decide anything about the possession as pleaded by the plaintiff but has chosen to rely upon the Ex.B10 and Ex.B11 to come to the conclusion that the plaintiff is not in possession of the disputed portion of the suit property. It is also relevant to point out that admittedly the vendor of Ex.B10 has not been examined and in such circumstances any contents of Ex.B10 and Ex.B11 to which the plaintiff is not a party cannot be put against the plaintiff to deny his right of continuous possession.

7.The learned counsel for the appellant by placing reliance on the judgment of this Court reported in AIR 1999 MADRAS 377 (SADHURAJAN V. SRIRAMULU NAIDU) has submitted that recitals as to boundaries in documents are not admissible in evidence unless the executants are examined, by referring to the earlier judgment reported in 1972(1)MLJ 317 (AMIAPPA NAINAR V. ANNAMALAI CHETTIAR). This Court in the above said judgment has held as follows;

> 28. . . . .
>
> "Recitals as to boundaries in documents not inter partes are inadmissible in evidence under Sections 11, 13(a), 32(3) and 32(7) of the Act. The only method by which recitals in a document not inter partes could be admitted in evidence is by examination of the executant of the document in which such recitals as to boundaries are found."
>
> In the present case the executants of Exs.A9 to A11 were not examined. Hence I hold that the recitals as to the boundaries in the documents marked as Exs.A9 to A11 not inter parties to the present suit are not admissible in evidence without examining the executants of the sale deeds marked as Exs.A9 to A11, and I answer this point also in favour of the appellant/1st defendant and as against the respondent 1 to 7/plaintiffs."

8.In a suit for injunction what is to be considered in respect of possession of the plaintiff, of course lawfully and the minor discrepancies in the document cannot be considered for throwing out the claim of the plaintiff simply based on the documents on the other side which has not been proved in respect of boundaries as admissible evidence as stated above. In view of the above said decision, it is clear that the learned first appellate Judge has not considered the issue in its proper perspective and rejected the claim of the plaintiff simply based on the Ex.B10 and B11 in which the plaintiff is not a party. The very fact that the defendants themselves have not

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

proved the documents which they rely upon in a manner known to law shows the case in favour of the plaintiff. The judgment and decree of the first appellate Court made in A.S.No.21 of 1993 dated 31.08.1994 are set aside and the appeal stands allowed. Consequently, connected C.M.P. is closed. There is no order as to costs.

Jikr

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To
1. The Subordinate Judge, Poonamallee
2. The Additional District Munsif, Poonamallee
3. The Section Officer, VR Section, High Court, Madras

+ one cc to Mr. S. Senthilnathan, Advocate sr no,. 21039
+ one cc to Mr. V. Chandrakanthan, Advocate sr no. 21456

ssv(co)
nm(14.04.07)

Second Appeal No.816 of 1995

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/